SUPREME COURT, U. S.
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IN THE

Supreme Court of the United States

OCTOBER TERM, 1973

No. 73-615

RALPH PRUDHOMME,

Petitioner,

versus

AL JOHNSON CONSTRUCTION COMPANY - MASSMAN CONSTRUCTION COMPANY, A JOINT VENTURE, AND AMERICAN MUTUAL INSURANCE COMPANY OF BOSTON,

Respondents.

RESPONDENTS-APPELLEES BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

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MAY IT PLEASE THE COURT:

This brief is filed in accordance with Rule 24 of This Court, on behalf of respondents-appellees, who were the original defendants in the District Court.

QUESTION PRESENTED

1) The right to relief under the Jones Act when an alleged seaman is not in the service of his vessel.

STATEMENT OF THE CASE

At the close of the trial on the merits of this case, the District Judge directed a verdict in favor of defendants on both the plaintiff's claims for relief under the Jones Act and for unseaworthiness.

The following specific facts are drawn from the plaintiff's testimony:

1) There was no regular assignment of Mr. Prudhomme to do any work on or connected with any barge or group of barges. (Prudhomme Tr. 35)

2) The work assignments were made on a daily basis, and sometimes several times a day, by the foreman of each union craft. (Prudhomme Tr. 35)

3) When a particular piece of work assigned by the foreman was completed, Mr. Prudhomme's connection with any barge which may have been used in that particular assignment was ended. (Prudhomme Tr. 34)

4) The carpenters were paid twenty-five cents an hour extra for all work done over water, by virtue of union contract. (Prudhomme Tr. 28)

5) The foreman, in this case Charles Sonnier, kept records of the work performed for the purpose of determining the amount paid for work on the water. These were the only records telling specific work performed on the job by the carpenters. (Prudhomme Tr. 30)

6) Mr. Prudhomme had examined the records prior to the trial and could point out no specific errors in the records. (Prudhomme Tr. 31)

7) On the day of his injury, Mr. Prudhomme had not done any work on any barge, except to walk across a barge to get to the pier. (Prudhomme Tr. 39-40)

8) At the time of Mr. Prudhomme's accident, the hopper supports were in no way connected to any crane or any barge, but were resting on the caisson. (Prudhomme Tr. 39)

SUMMARY OF ARGUMENT

1) The plaintiff to recover under the Jones Act must show that he was either permanently assigned to a vessel or performed a substantial part of his work on the vessel, and that such work in connection with the vessel aided in the accomplishment of its mission.

2) In order for one to be entitled to a claim for unseaworthiness one must be injured in the service of a vessel.

3) Where the plaintiff does not show the necessary requisites for Jones Act status or a duty of seaworthiness, a directed verdict is appropriate.

ARGUMENT

Jones Act Status

The test as to whether one is a seaman, entitled to the remedies provided by the Jones Act, is now fairly well settled, and the test is set forth in *Producers Drilling Co. v. Gray*, 361 F.2d 432:

> "... (1) if there is evidence that the injured workman *was assigned permanently to a vessel* (including special purpose structures not usually employed by a means of transportation by water but designed to float on water); *or performed a substantial part of his work on the vessel*; and (2) if the capacity in which he was employed or the duties which he performed *contributed to the function of the vessel or to the accomplishment of its mission*, or to the operation or welfare of the vessel in terms of its maintenance during its movement or during anchorage for its future trips." (Emphasis added.)

This standard breaks itself into two parts, so far as the nature of his employment is concerned, in that he must either be "assigned permanently" or "perform a substantial part of his work."

Mr. Prudhomme's assignments were totally impermanent. On the contrary, any assignment to do a piece of work which necessitated the use of a barge was made daily, or even hourly, and the assignment ter-

minated when the individual piece of work was completed. These facts may be compared to *Creel v. Drill Tender Jack Cleverly*, 264 F.Sup. 98. In that case, the plaintiff spent only about ten (10%) percent of his time on a vessel, and the remainder of his time on a stationary platform. However, the assignment to the vessel in that case was permanent. That is, the plaintiff had recurring, steady duties which were his alone to be performed on the vessel. In the instant case, Mr. Prudhomme had no steady, regular or recurrent duties; and he never knew from one day to the next whether there would be any connection with any barge whatsoever required of him.

As to whether the plaintiff spent a substantial portion of his time in the service of any vessels, even taking all the barges as a group, the Trial Court found that approximately four (4%) percent of the plaintiff's time was spent in connection with barges during his last month of work. Most of this work was of a loading and unloading nature which, while certainly classified as part of the traditional work of a seaman, is also specifically defined as the work of a longshoreman.

What is "substantial" is one of the facts to be determined in the case, as in any other. What the Trial Court has held is that, as a matter of law, the amount of work which the plaintif did on or around barges was not "substantial."

Unseaworthiness Claim

The petition for certiorari does not separately discuss the claim for unseaworthiness made in the Trial

Court. However, we discuss it briefly on the assumption it is not abandoned.

On the day of his accident, plaintiff was moving wooden supports which were resting on the caisson. The caisson was sunken into the bed of the river. These wooden supports were not connected to any vessel in any way. They had been stationary on the caisson since the prior afternoon.

In order to be entitled to the warranty of seaworthiness, one must be in the service of a vessel, performing the traditional duties of a seaman, at the time of his accident. *Atkins v. Greenville Ship Building Corp.*, 411 F.2d 279.

These bare facts confirm the absence of plaintiff's right to the warranty of seaworthiness.

The Directed Verdict

This Court, in *Senko v. LaCrosse Dredging Corp.*, 352 U.S. 370, held that one's status as a Jones Act seaman is a fact, just as in any other fact in civil litigation, using the following language:

> "As we have said before, this Court does not normally sit to re-examine a finding of the type that was made below.
>
> "We believe, however, that our decision in *South Chicago Coal & Dock Co. v. Bassett, supra,* has not been fully understood. Our hold-

> ing there that the determination of whether an injured person was a 'member of a crew' is to be left to the finder of fact meant that juries have the same discretion they have in finding negligence or any other fact. The essence of this discretion is that a jury's decision is final if it has a reasonable basis, whether or not the appellate court agrees with the jury's estimate."

In *Producers Drilling Co. v. Gray, supra,* the Fifth Circuit reviewed previous cases decided by it in light of This Court's decisions in *Senko v. LaCrosse Dredging Corp.,* 352 U.S. 370 (1957); *South Chicago Coal & Dock Co. v. Bassett,* 309 U.S. 251 (1940); and *Gianfala v. Texas Co.,* 350 U.S. 879 (1955).

In *Producers Drilling Co. v. Gray, supra,* the Court stated the following:

> "Since the *Adams* case, this Court has on at least three occasions stated that the issue of status is not necessarily a question for the jury in every case. *Thibodeaux v. J. Ray McDermott & Co.,* 5th Cir. 1960, 276 F.2d 42, 46; *Stanley v. Guy Scroggins Constr. Co.,* 5th Cir. 1961, 297 F.2d 374, 378; *Rotolo v. Halliburton Co.,* 5th Cir. 1963, 317 F.2d 9, 12, cert. denied, 375 U.S. 852, 84 S.Ct. 111, 11 L.Ed.2d 79. In *Thibodeaux,* we affirmed a directed verdict for the defendant on the question of the status of a welder who had a brief work assignment on a barge and whose relationship to the barge was

> described as 'purely transitory.' The Court noted 'the mistaken belief of so many that merely because the status of *who* is a seaman may be a question of fact, the principles summarized by us in *Offshore Co. v. Robison* * * * perforce make every case one of fact for jury decision.' 276 F.2d at 46 (Emphasis in original)."

The Fifth Circuit has continued to apply these principles, including the recent cases of *Barrios v. Louisiana Construction Materials Co.*, 465 F.2d 1157 (5th Cir. 1972), and *Ross v. Mobil Oil Corp.*, 474 F.2d 989 (5th Cir. 1973). In the *Ross* case, as well as in *Cox v. Otis Engineering Corp.*, 474 F.2d 613 (5th Cir. 1973), summary judgment or directed verdicts were upheld on the question of seaman status.

The principle is thus well established, in accordance with *Senko, supra,* that the directed verdict under Rule 50 of the Federal Rules of Civil Procedure is an appropriate action, given the evidence in a particular case. The factual issue of status is to be decided the same as any other factual issue, and any such factual issue is subject to the authority for a directed verdict under Rule 50.

The Scope of Plaintiff's Employment

The defendants had raised in the Lower Courts an issue not necessary for the decision of this case in those

Courts. That is, whether even if the plaintiff at any time could have been accorded status of a seaman, at the time of his accident he was not in the service of any vessel.

The Jones Act, 46 U.S.C. 688, permits recovery by seamen for injuries suffered "in the course of his employment." This has been held to include, for example, driving to work on the vessel where the transportation was furnished by the employer.

However, in the present case, the plaintiff was in the service of no vessel at the time of his accident. If the "course of employment", as used in the Jones Act, is equivalent to the "service of the ship" formula used in maintenance and cure cases, *Braen v. Pfiefer Oil Transport Co.*, 361 U.S. 129, 80 S.Ct. 347; *Vincent v. Harvey Well Service*, (5th Cir.) 441 F.2d 146, then this plaintiff was not in the service of any ship at the time of his accident.

CONCLUSION

This case presents nothing unusual. Given a specific set of facts, both the Trial Court and the Appellate Court found that as a matter of law there was not sufficient evidence to warrant a presentation of the issue of Jones Act status to the jury.

ince the question of status is a fact, the same as other fact in any other case, the application of irected verdict in this case was appropriate.

Respectfully submitted:

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CERTIFICATE

HEREBY CERTIFY that a copy of the above and going Brief on behalf of Respondents-Appellees has duly mailed to the following counsel of record e address indicated:

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fayette, Louisiana, this ____ day of November,

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